SUPREME COURT OF APPEALS OF VIRGINIA.

YOST *et al. v.* CRITCHER.

Nov. 17, 1910. On Rehearing, Nov. 16, 1911.

[72 S. E. 594.]

1. Partnership (§§ 11, 70*)—Existence of Relation.—An agreement whereby complainant and defendant purchased land, defendants furnishing the money and complainant performing service in drawing attention to the land, for resale at a profit, was in the nature of a partnership agreement, and required of each in the transactions inter se a high degree of duty.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 114; Dec. Dig. §§ 11, 70.*]

2. Partnership (§ 95*)—Mutual Duties—Purchase of Interests.—One partner must make a frank and honest disclosure to another of all knowledge from which a sound judgment may be formed as to the value of an interest to be acquired by the former from the latter.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 142; Dec. Dig. § 95.*]

3. Partnership (§ 95*)—Fiduciary Relation—Right to Share in Profits.—Two partners who, knowing that their associate was pecuniarily embarrassed, induced him to sell his interest at a sacrifice in ignorance of matters with their knowledge, and, who subsequently acquired his interest from the person to whom he sold, will be required to account to him for his share of the net profits, though such person did not act for them in purchasing.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 142; Dec. Dig. § 95.*]

4. Vendor and Purchaser (§ 238*)—Bona Fide Purchasers.—Generally a purchaser with notice from a purchaser without notice, takes a good title; but, if a purchaser with notice sells to a purchaser without notice and afterwards repurchases, he does not acquire any better title than he had in the first instance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent Dig. §§ 580-582; Dec. Dig. § 238.*]

5. Trusts (§ 225*)—Expenditures—Interest.—On an accounting by the trustees, interest should be allowed only on moneys actually paid by them from the time of payment, and on contracts to pay bearing interest from the time such interest began to run.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 225.*]

Harrison, J., dissenting.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Appeal from Corporation Court of Staunton.

Suit by John Critcher against Jacob Yost and others. From the decree, defendants appeal, and complainant files cross-errors. Modified and affirmed.

A. C. Gordon and *J. M. Perry,* for appellants.
John Critcher, for appellee.

WHITTLE, J. In the spring of 1903 Glendy and wife conveyed to Jacob Yost, trustee, 3,249 acres of land in Bath county for $10,000. The deed did not declare the character of the trust, but it appears that William Patrick and John Critcher were interested in the purchase along with Yost, and a written agreement was made between the parties to the effect that Yost and Patrick should advance the purchase money, and the title was to be held by Yost for the common benefit of himself and his associates in the proportion of three-eights each to Yost and Patrick and two-eights to Critcher; that the trustee, in conjunction with the other parties and with their advice and assistance, should sell the property, and, after returning the purchase money with interest and all reasonable expenses, divide the profit in the proportions mentioned. Critcher's contribution to the joint venture consisted in drawing the attention of his companions to the land and its possibilities—a service the ultimate outcome of which was the realization of a gross profit of $14,000.

In June, 1903, Critcher who was very much in need of money, wrote to Yost to inquire if there would be any objection to his selling one-half of his interest to an outside party, remarking that he would not sell unless it was agreeable to his associates. Yost in reply conceded Critcher's right to sell, but suggested that he ought in the first instance to give himself and Patrick the privilege of buying if so disposed. This correspondence was followed by an offer from Critcher of one-half of his holding for $500, and a counter proposition from Yost of $500 for his whole interest. Both propositions were declined, and soon after these occurrences the relations between Critcher and Yost became strained, and all direct communication between them ceased.

In September, 1904, the trustee entered into negotiations with Housel, of Bedford, Pa., for the sale of the timber on the land for $17,000; and on September 15th Housel telegraphed his agent to close the deal. The trustee, accordingly, executed a deed conveying the timber to Housel at the agreed price, reciting a cash payment of one-third of the purchase money. In fact

only $200 were paid, and the deed with a draft attached for the residue was forwarded to Bedford to be delivered on payment of the draft. On September 28th Housel's attorney wrote Yost that when certain minor objections to the form of the deed, to which he called attention, were corrected, his client would pay the draft and complete the purchase. To that letter both Yost and Patrick replied agreeing to some of the suggested changes in the deed; but Yost insisted that the draft must either be paid and the bonds for the deferred payments signed, or else that all the papers be returned without delay. He, moreover, declared that, "at the very time this transaction was closed, other parties were ready to buy," observing that: "Unless you gentlemen propose to close this matter up without further delay, kindly return all the papers to me and consider the deal off. We cannot afford to give longer time. In fact we have already jeopardized our interests in the effort to accommodate you." On October 8th the deed was reformed in compliance with Housel's insistence, but not until October 22d was there a definite refusal on his part to comply with the agreement. So that until the latter date Yost and Patrick had every reason to believe the sale would be consummated.

In May, 1905, the trustee sold the timber to Housel and Layman. The price is not disclosed, but it appears that Yost subsequently paid a bonus of $3,700 to be released from the contract. That happened in this way: The Highland Development Company offered $24,000 for the entire property, land, and timber; whereupon Yost bought back the timber from Housel and Layman at the above-named advance on the selling price, and then sold land and timber to the Highland Development Company for $24,000. Meanwhile, on September 28, 1904, R. N. Page, through B. L. Partlow, opened negotiations with Critcher for the purchase of his interest, and the sale was made October 7th for $1,000. Within a few months thereafter Page sold to Yost and Patrick. The record is silent both as to the date and consideration for this transfer; but it appears that, though Yost and Patrick freely advised with each other touching every material step looking to a sale of the community property, Critcher was not informed of transactions vitally affecting his rights. Thus, at the very time when they believed a sale of the timber alone had been made for $7,000 (and other advantageous offers of purchase had been received), they not only failed to communicate to Critcher knowledge of these important facts, but he was suffered to part with his property for a grossly inadequate price, much less, indeed, than his share of the amount offered for the timber alone.

In these circumstances, upon a bill filed by Critcher for relief, the learned judge of the corporation court of the city of Staunton, in a convincing opinion, held that he was entitled to share in the net profits realized from the sale of the Highland Development Company, and decreed accordingly. From that decree this appeal was allowed.

The bill called for answer under oath from the trustee with respect to documents and correspondence in his possession. It also demanded sworn answers from Partlow and Page, but waived answer under oath from Patrick. It is conceded that Partlow was acting for Page in negotiating the purchase of Critcher's interest, and, though the parties all deny that Page represented Yost and Patrick, the facts remain that he made the purchase at Patrick's suggestion, and shortly thereafter transferred his purchase to them for "a valuable consideration." Yost, it is true, denied that he had any communication with Partlow in reference to the purchase prior to the institution of the suit. He likewise denied the agency of Page. Yet, though alertly on guard and weighing his words, he was careful not to deny knowledge of Page's purpose to purchase, or communication between them on the subject. As a matter of fact, in view of the close touch maintained between himself and Patrick throughout the transaction, it is not believable that Yost was kept in ignorance of a scheme obviously designed for the purpose of eliminating an unwelcome associate by acquiring his interest in the trust subject. If the transaction had been ingenous, there would have been no occasion to conceal the actual consideration paid by Yost and Patrick to Page; and, instead of suppressing important facts, the parties, if necessary, would have taken the witness stand to make plain the fairness of their conduct in connection with a questionable transaction.

The defense of the appellants is founded on a misapprehension of the law regulating the conduct of persons occupying a fiduciary relation to each other with respect to their dealings with matters pertaining to the trust. In this case the contract between the parties was in the nature of a partnership agreement, and imposed upon each in transactions inter se the high degree of duty arising out of that confidential relation

As was said in Tennant *v.* Dunlop, 97 Va. 234, 33 S. E. 620, speaking of the duty of the surviving partner seeking to purchase the interest of the deceased partner: "He cannot simply remain passive, but must make a frank and honest disclosure of all within his possession or knowledge from which a sound judgment may be formed as to the value of the interest to be sold.

He cannot hold the representative at arm's length, and seek to make a profit for himself."

So, also, in 30 Cyc. 457, it is said that a purchase by one partner of his copartner's interest may be avoided either for actual fraud, "or for the violation of that high degree of good faith and fair dealing which the law requires of the partners in their transactions with each other, or for a nonperformance of a condition imposed by the contract."

In Sexton *v.* Sexton, 9 Grat. 204, the court held: "He (the selling partner) was bound not only to disclose truly any information in his possession that might be called for, but if he perceived that the purchasing partner was laboring under incorrect views in reference to the amount of the debt due by the concern, by which he might be mislead into too high an offer for the interest to be sold, it was his duty to furnish all the data he might have by which such views might be corrected and the mischief prevented."

In the instant case, though we do not believe the parties were intentionally guilty of fraud, it is, nevertheless, plain that they did not exercise that "utmost good faith and fair dealing" which the law exacts in transactions between partners, or trustee and cestui que trust. Yost and Patrick knew that Critcher was laboring under great financial embarrassment, and, if they did not actually purchase his interest through Page, they, at least, induced the latter to buy and suffered Critcher to sell at a ruinous sacrifice, in ignorance of important facts in their possession materially affecting the price.

As was said in Miller *v.* Ferguson, 107 Va. 249, 255, 57 S. E. 649, 651, 122 Am. St. Rep. 840: "After availing themselves of Miller's plan and eliminating him as a possible competitor, they carried on negotiations behind his back and withheld from him information of the gravest importance, vitally affecting his interest."

It is immaterial whether Page did or did not act for Yost and Patrick in purchasing Critcher's interest. They permitted the sale to be made in circumstances which affected their consciences and involved a breach of trust, and the property which was subsequently acquired by them was impressed with the original trust in Critcher's favor.

It is true as a general proposition that a purchaser with notice from a purchaser without notice takes a good title. Otherwise, it is reasoned, a bona fide purchaser without notice might be hindered in the disposition of the property, "though entitled to have the whole world for his market." But the rule is subject to the exception that, when a purchaser with notice sells

to a purchaser without notice and afterwards repurchases the property, he does not acquire any better title than he possessed in the first instance. Aragon Coffee Co. *v.* Rogers, 105 Va. 51, 52 S. E. 843. See note to principal case and authorities cited, 8 Am. & Eng. Ann. Cas. 626.

"As between cestui que trust and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust." 28 Am. & Eng. Ency. of Law (2d Ed.) 1108g and note 10.

In considering the cross-errors assigned by the appellee, the commissioner should require proof of the alleged payment by Yost of $3,700 to Housel and Layman. He must also allow interest only on moneys actually paid by Yost and Patrick from the time of payment, or upon any contract made by them for the payment of money bearing interest from the time such interest began to run. In these particulars the decree of the corporation court will be modified, and as thus modified will be affirmed.

Affirmed.

CARDWELL, J., absent.

HARRISON, J. (dissenting). With my view of the facts of this case, I cannot concur in the conclusion reached by the majority of the court.

On Rehearing.

PER CURIAM. This case is before us on a rehearing of a decree entered by this court at the November term, 1910, modifying and affirming a decree of the corporation court of the city of Staunton.

After careful consideration of the arguments on behalf of appellants and appellee, upon the rehearing, we are of opinion to adhere to the conclusion formerly reached, and the opinion then delivered, with some minor amendments, will be filed as the opinion of the court.